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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 57

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE F. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER TO BRIEF OF THE RESPONDENTS ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED.

FILED BY LEAVE OF COURT.

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Summary of the argument:

The question of survivorship of petitioner's cause of action against the executors of the estate of Henry Horner is governed by the survivorship statute of the State of Illinois.

List of Authorities Cited.

Cairo et al. v. Est. of Gingham, 268 Ill. App. 510, 513 5

Devine v. Healy, 241 Ill. 34, 37 5

Erie R. Co. v. Tompkins, 304 U. S. 64, 79 ..... notes 2, 4 3, 6

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STATEMENT.

MAY IT PLEASE THE COURT:

As the respondents, Robert E. Straus, Eli M. Straus and James Levy, executors, elected to file a brief in addition to

the brief opposing petition for certiorari and in said brief presents, for this Honorable Court's consideration, the question as to whether or not petitioner's cause of action survived the death of Henry Horner. This question was argued fully before the Circuit Court of Appeals by the said respondents. Leave was given by this Court, at the argument of this matter before this Court, to file a reply to respondents' brief on said question of survivorship.

ARGUMENT.

Respondents, Robert E. Straus, Eli M. Straus and James Levy, executors, in their brief, rely upon the proposition that "There is no general federal statute governing survival of actions." They further argue that "the question whether the cause of action survives the death of the alleged wrongdoer must be decided in accordance with the common law." Respondents further contend that the Illinois statutes on abatement or survival of actions have no bearing on a suit to *recover damages* under the federal Civil Rights Act.

While, strictly speaking, there may be no survivorship statute of the United States, this Court has held that while "Congress has not, speaking generally, attempted to prescribe the causes which survive the death of either party. Sec. 955, Rev. Stat. (28 USCA 778) provides that—'when either of the parties, • • • prosecute or defend and such suit to final judgment.'

"This does not define the causes which survive. In the absence of some special legislation the question in each case must be settled by the common law or the law of the State in which the cause arose."[1] "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else • • •.

> "the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last words."[2]

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[1] *Patton* v. *Brady, Ex.*, 184 U. S. 608, 612. See Rule 25 under Title 28 foll. #723c.

[2] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 79.

Mr. Justice Black speaking for this Court said "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."[3]

The substantive law of Illinois as expressed by its Statutes with reference to survivorship is declared in Chapter 3, Paragraph 494, Ill. Rev. Stat. 1941, in the following language:

> "Actions Which Survive. In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover for an injury to real or personal property, *actions against officers for misfeasance, malfeasance or nonfeasance* of themselves or their deputies * * *."

Petitioner contends that the question of survivorship in this matter is and should be controlled by the statutes and jurisprudence of the State of Illinois. Judge Wham in the case of *Francis* v. *Humphrey*, 25 Fed. Suppl. 1, a case decided in District Court, Eastern Division of Illinois, on page 3 had the following to say:

> "But the decision in *Erie R. Co.* v. *Tompkins, supra*, has legally speaking, 'turned the world upside down.' By that decision the independent body of so-called federal substantive law under the doctrine of *Swift* v. *Tyson, supra*, ceased to be controlling authority in the Federal Courts. Now each Federal Court must follow the substantive law of the state where the particular court is located or the state where the action arose, as settled and declared by the courts of that state. Now the substantive laws of Illinois, as established by the decisions of her courts, as well as by her

[3] *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245.

> statutes, must be regarded as the controlling rules of decision in the trial of actions arising in that state in the federal courts."

The above case is cited for the Court's information as to the opinion of the Judges of the District Courts of Illinois.

In *Devine* v. *Healy*, 241 Ill. 34, the question of survivorship was before the Supreme Court of Illinois and after a review of the common law rule the Court, on page 37, stated:

> "With the law in this condition the Legislature, in 1872, enacted Section 122, Chapter 3, Hurd's Rev. Stat. 1908 (now Sec. 494, Chap. 3, Ill. Rev. Stat. 1941). * * * This section provides for the survival of any action therein designated if the party aggrieved, or the wrongdoer, or both, should die."

In *Cairo et al.* v. *Estate of Bingham*, 268 Ill. App. 510, the clause of the section of the Illinois statute was under consideration and the Court said, page 513:

> "Among these are 'actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies.' *Manifestly this means public officers.*"

Mr. Justice Evans in the case of *Luster* v. *Martin* (C. C. A. 7), 58 F. 2nd 537, at page 539 said:

> "Whether a pending action may be revived upon the death of either party depends primarily upon the laws of the jurisdiction in which the action was commenced."

In that case the question of survivorship was predicated upon the fact that the Wisconsin statute, the state in which the action was commenced, expressly provided for the survival of actions of the character before the Court.

Respondents have cited many cases a reading of which will show that none of the cases are in any way persuasive as to the conception of the law as the respondents would have the Court to view it.

The rule of law as announced by our Federal Courts and the Federal Statutes is that "the question in each case must be settled by the common law or the law of the state in which the cause arose." "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally speaking but the law of that State existing by the authority of that State."[4] And by the law of the State of Illinois, as expressed in its substantive law the present cause of action survived against the executors of the estate of Henry Horner. And again quoting the words of Mr. Justice Black that "the constant objective of legislation and jurisprudence is to assure to litigants full protection for all substantive rights intended to be afforded by the jurisdiction in which the right itself originates."[5]

Respectfully submitted,

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[4] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 79.
[5] *Garrett* v. *Moore-McCormack*, 317 U. S. 239, 245.